MBF Insurance Bhd v Syarikat Lektrik Heap Seng

HIGH COURT (IPOH) — ORIGINATING MOTION NO 25–22 OF 2001
JAMES FOONG J
20 MARCH 2002

Civil Procedure *— Stay of execution — Setting aside — Stay of execution pending appeal to High Court granted by sessions court — Applicant applied to High Court to set aside stay of execution — Whether High Court could entertain application to set aside stay of execution — Whether only method to reverse stay of execution was by way of appeal — Rules of the High Court 1980 O 55 r 12*

The plaintiff/applicant in this proceeding claimed from the respondent a sum of RM92,922.10 with interest and cost arising from a burglary insurance claim which the respondent refused to pay out to the applicant. The sessions court at first instance allowed the applicant's claim. The respondent applied to the same court and an order for stay of execution pending appeal to the High Court was granted. The respondent filed an appeal to the High Court against the decision of the sessions court and the applicant commenced an action by way of an originating motion in the High Court to set aside the stay of execution.

Held:

Under O 55 r 12 Rules of the High Court 1980 ('the RHC'), the High Court had an independent jurisdiction to entertain an application for a stay. But once an order for stay was allowed by the court below, then the High Court was no longer entertaining an application for stay, for stay had already been granted. Therefore O 55 r 12 only empowered the High Court to grant a stay and not to reverse any such order once allowed. This provision of the RHC did not provide an avenue to review the decision handed down by the court below. It only permited the High Court to entertain an application for stay if none was in existence. Thus, where the court below decreed an order, and there was no special procedure prescribed to deal with it otherwise, then the only route to seek a reversal of that order was by way of an appeal (see pp 447H–448A).

[**Bahasa Malaysia summary**

Plaintif/pemohon di dalam prosiding ini menuntut daripada responden RM92,922.10 bersama faedah dan kos yang berbangkit daripada tuntutan insurans kecurian yang mana responden enggan bayar kepada pemohon. Mahkamah sesyen telah membenarkan permohonan pemohon pada asalnya. Responden telah memohon kepada mahkamah yang sama dan perintah penangguhan perlaksanaan sementara rayuan kepada Mahkamah Tinggi telah dibenarkan. Responden telah memfailkan rayuan kepada Mahkamah

Tinggi terhadap keputusan mahkamah sesyen dan pemohon telah memulakan suatu tindakan melalui usul pemula di dalam Mahkamah Tinggi untuk mengetepikan penangguhan perlaksaanan tersebut.

Diputuskan:

Di bawah A 55 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), Mahkamah Tinggi mempunyai bidang kuasa untuk mempertimbangkan permohonan untuk penangguhan. Akan tetapi setelah permohonan untuk penangguhan dibenarkan oleh mahkamah di bawah, Mahkamah Tinggi tidak lagi mempertimbangkan permohonan untuk penangguhan kerana penangguhan telahpun dibenarkan. Oleh yang demikian, A 55 k 12 hanya memberi kuasa kepada Mahkamah Tinggi untuk membenarkan penangguhan dan bukan mengakaskan perintah sedemikian setelah ia dibenarkan. Peruntukan KMT ini tidak memperuntukan cara untuk mengkaji semula keputusan yang diberi oleh mahkamah di bawah. Ia hanya membenarkan Mahkamah Tinggi mempertimbangkan permohonan untuk penangguhan jika tiada penangguhan langsung. Oleh itu, di mana mahkamah telah mendekrikan perintah, dan tidak terdapat prosedur yang khusus mengenainya, satu-satunya cara untuk mengakaskan perintah tersebut adalah melalui rayuan (lihat ms 447H–448A).]

Notes

For cases on stay of execution generally, see 2(3) Mallal's Digest (4th Ed, 2001 Reissue) paras 5459–5498.

Cases referred to

J Lucas (Batteries Ltd & Anor v Gaedor Ltd & Ors [1978] RPC 389 (refd)

VGM Holdings Ltd, Re [1941] 3 All ER 417 (refd)

Shanmugam Pillai v Panjali [1961] MLJ 290 (refd)

Taman Penawar Sdn Bhd v Khoo Guat Ngoh & Ors [1995] 1 AMR 424 (refd)

Legislation referred to

Rules of High Court 1980 O 55 r 12

Karnail Singh (*KS Sidhu & Co*) for the plaintiff.

A Iruthaya Raj (*Raj Selva & Co*) for the defendant.

James Foong J:

Introduction

The applicant in this proceedings was the plaintiff in a civil action ('the action') filed in the Sessions Court at Ipoh, bearing No 52–2124–98. In the

court below, the applicant, as plaintiff, was claiming from the respondent, who was the defendant in the action, a sum of RM92,922.10 with interest and costs arising from a burglary insurance claim which the respondent refused to pay out to the applicant. After a full hearing, the sessions court judge allowed the applicant's claim with interest and costs. But upon a subsequent application by the respondent's counsel to the same court, an order for stay of execution pending appeal to the High Court was granted.

Both parties were dissatisfied with the outcome at the lower court. The respondent filed an appeal to the High Court against the decision, and the applicant commenced an application by way of an originating motion in the High Court to set aside the order for stay of execution. This application is now before me for consideration.

Preliminary objection

At the outset of the hearing, Mr Raj, counsel for the respondent, raised a preliminary objection to this motion insisting that it is wrong in procedure and law. He submitted that if the applicant is unhappy with the decision of the sessions court to stay the execution, the applicant should file an appeal against that decision and not by way of an attempt to set aside the order for stay in the High Court.

Mr KS Sidhu, counsel for the applicant, disagreed with this contention and tendered to me the current High Court authority of *Taman Penawar Sdn Bhd v Khoo Guat Ngoh & Ors* [1995] 1 AMR 424 which supports the correctness of the approach adopted by the applicant.

Refusing to concede, Mr Raj returned with English authorities to convince me that *Taman Penawar Sdn Bhd* was decided without having the opportunity to consider these persuasive authorities.

Analysis

After careful consideration of the law and cases cited, I am of the view that the provision governing the process of an application to the High Court for a stay of execution pending an appeal to the High Court is O 55 r 12 of the Rules of High Court 1980 ('the RHC'). It provides:

> An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the court appealed from.

From decided authorities, principally *Shanmugam Pillai v Panjali* [1961] MLJ 290, the court below from where the decision was appealed from and the High Court have coordinate jurisdiction to entertain applications for stay of execution, except that while the High Court is possessed of such jurisdiction, 'it will not exercise its independent jurisdiction until an application has been made to the same effect and decided upon in the court below.' — per Ismail Khan J (as he then was).

In *Shanmugam Pillai*, the appellant was ordered by the sessions court to give up vacant possession of certain portions of a premises to the respondent. An application was subsequently made by the appellant in the sessions court to stay the execution of this judgment. It was refused. Thereupon, the appellant appealed to the judge of the High Court against this decision. Before the appeal could be argued, the respondent's counsel raised the preliminary objection that such an appeal is not warranted by any rules of procedure. The learned judge agrees with him, and after pointing out the independent jurisdiction of the High Court to grant stay of execution besides that possessed by the court below, stressed:

> Therefore, where a special procedure is prescribed, as in this case, by an application to the High Court to grant a stay of execution of a judgment in the court below, pending appeal, I am not prepared to say that an entirely different step taken to achieve that objective, as it has been done in this case by appealing against the refusal for stay of execution by the Court below, is a curable irregularity. I have no power to convert appeal into an application.

But one must bear in mind that the appeal mounted by the appellant in *Shanmugam Pillai* was against the refusal of the court below to grant a stay of execution, whilst in our present situation, as well as that in *Taman Penawar Sdn Bhd*, a stay was allowed and followed by an application to the High Court by the dissatisfied party to set aside such order. Justice Vincent Ng J, strongest justification in *Taman Penawar Sdn Bhd* to entertain such process instead of an appeal is, in my humble opinion, set out in his fifth ground of reason at p 430 of the judgment where he declares:

> As it is trite law that a party who is refused stay in the lower court may yet move to the High Court by originating motion for a stay, it would thus be unjust not to allow the aggrieved party who had been prevented by such a stay from claiming the fruits of his litigation to move to the High Court by means of a similar procedure. It is axiomatic that courts have to be even handed when considering such matters of procedure vis-a-vis the successful as well as the unsuccessful party in the suit or action. It ought to be noted that a litigant's right to the fruits of his litigation is as valid and imperative as the opponent's right to the maintenance of the status quo pending appeal; a fortiori, when the court of first instance has held in the former's favour after having heard the evidence.

With the greatest of respect, though this may pose a strong moral argument to allow an aggrieved party where stay was granted by the court below to apply to the High Court to set aside an order for stay by way of an originating motion instead of an appeal, this is not warranted by any rules of procedure. Order 55 r 12 of the RHC only arms the High Court with an independent jurisdiction to entertain an application for stay and even this will only be exercised after the court below has made a decision of a similar application. This is revealed from the circumstances in *Shanmugam Pillai* where the High Court directed the appellant to make an application under O 55 r 12 RHC for a stay. But once an order for stay is allowed by the court below, then the High Court, in my view, is no longer entertaining an application for a stay, for a stay has already been granted. Order 55 r 12 RHC, as expressed, only empowers the High Court to grant a stay not to

reverse any such order once allowed. This provision of the RHC does not provide an avenue to review the decision handed down by the court below. It only permits the High Court to entertain an application for stay if none is in existence. Thus, where the court below decrees an order, and there is no special procedure prescribed to deal with it otherwise, then the only route to seek a reversal of that order is by way of an appeal.

This approach is adopted by the English Court of Appeal in *J Lucas (Batteries Ltd & Anor v Gaedor Ltd & Ors* [1978] RPC 389, which may not have been cited to the learned judge in *Taman Penawar Sdn Bhd*. In this case, the High Court has granted a stay for taking of accounts as to profits for infringing a patent in an intellectual property action. The aggrieved party of this order gave notice of an application before the Court of Appeal to set aside this stay. The opposing counsel adopted a similar preliminary objection to the one raised in our case. The ruling by the court is:

> A preliminary question arose as to the form of the proceedings. Mr Aldons, on behalf of the plaintiffs contended, that the appropriate procedure to obtain the removal of a stay must be similar to that for obtaining a stay in this court, and that under RSC O 59 r 13(1), the proper course for obtaining a stay was by original motion and not by way of appeal. I express no opinion as to whether that proposition is correct in relation to seeking a stay, but I entertain no doubt that *where a stay has been granted, the only way of getting rid of it is by appeal.* (Emphasis added.)

The strict adherence to this approach (appeal rather than by way of an attempt to reverse a decision where stay has been granted) also found favour in the case of *Re VGM Holdings Ltd* [1941] 3 All ER 417. There the respondent applied to vary a stay order granted by another judge. Justice Morton, in refusing, declared:

> I think that, when a judge has made an order such as that in the present case, the only remedy for the respondent, if he is dissatisfied with the order, is to go to the Court of Appeal…

Conclusion

Holding the above views, I must conclude that this application of the plaintiff is wrong in law and has to be dismissed with costs. But this does not prevent the plaintiff from filing an appeal against the decision of the court below in granting stay, provided of course the plaintiff is within the prescribed time for filing such appeal.

Order accordingly.

Reported by Wong Ee Lynn